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Office of Water Management

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Water Docket
U.S. Environmental Protection Agency
Mailcode 4101T
1200 Pennsylvania Avenue, NW
Washington, DC 20460

Attention: Docket ID No. OW-2002-0050

Dear U.S. Environmental Protection Agency:

The Pennsylvania Department of Environmental Protection (DEP) would like to take this opportunity to comment on the "Advance Notice of Proposed Rulemaking on the Clean Water Act Definition of 'Waters of the United States'" published in the January 15 issue of the *Federal Register*. The purpose of the Advanced Notice of Proposed Rulemaking (ANPR) is to address issues relating to the jurisdictional scope of "waters of the United States" in light of the Supreme Court's decision in *Solid Waste Agency of Northern Cook County v. U.S. Army Corps of Engineers*, 531 U.S. 159 (2001), commonly referred to as SWANCC.

The ANPR seeks "input on what, if any, revisions in light of SWANCC might be appropriate to the regulations that define 'waters of the U.S.'" (68 FR 1992). More specifically, the proposal seeks comment on two issues:

1. Whether, and if so, under what circumstances the factors listed in 33 CFR 328.3(a)(i)-(iii) (i.e., use of the water by interstate or foreign travelers for recreational or other purposes, the presence of fish or shellfish that could be taken and sold in interstate commerce, the use of the water for industrial purposes by industries in interstate commerce) or any other factors provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters.
2. Whether the regulations should define "isolated waters," and if so, what factors should be considered in determining whether a water is or is not isolated for jurisdictional purposes.

Before addressing these issues, we believe it would be helpful to review the SWANCC decision. The facts are well known, so it is not necessary to provide the factual background other than that which is necessary for this analysis.

After initially determining that it did not have jurisdiction over the wetlands at issue, the Army Corps of Engineers (Corps) reversed course and determined that the wetlands were subject to CWA jurisdiction. The Corps based its new determination on a specific section of the so-called Migratory Bird Rule. The Migratory Bird Rule is a clarification of the Corps' jurisdiction under Section 404 of the CWA as outlined in 33 CFR §328.3(a)(3). The Migratory Bird rule provides that Corps jurisdiction under Section 404 of the CWA extends to intrastate waters:

1. Which are or would be used as habitat by birds protected by Migratory Bird Treaties; or
2. Which are or would be used as habitat by other migratory birds which cross state lines; or
3. Which are or would be used as habitat for endangered species; or
4. Used to irrigate crops sold in interstate commerce.

See 51 Fed. Reg. 41217 (Nov. 13, 1986). In SWANCC, the Corps ultimately asserted jurisdiction under subpart (b) of the Migratory Bird Rule. In other words, jurisdiction was asserted on the basis that the wetlands at issue "are or would be used as habitat by . . . migratory birds [other than those protected by Migratory Bird Treaties] which cross state lines." The Supreme Court majority specifically held that " . . . 33 CFR §328(a)(3), as clarified and applied to petitioners' . . . site pursuant to the Migratory Bird Rule . . . exceeds the authority granted to [the Corps] under §404(a) of the CWA." 531 U.S. 174 (2001) (emphasis added). Emphatically, the Court did not invalidate the Migratory Bird Rule itself nor did it invalidate the implementing regulation, 33 CFR §328.3(a). Rather it invalidated the clarification and application of one subpart, subpart (b), of the Migratory Bird Rule. The remaining subparts of the Migratory Bird Rule remain intact, viable and enforceable.

Although the Court, in SWANCC does clarify one specific aspect of the federal wetland regulatory program, that decision does not negate the overarching goal of the Clean Water Act to "... restore and maintain the chemical, physical, and biological integrity of the Nation's waters." To achieve that goal, it is imperative that Federal and State agencies responsible for achieving the objectives of the CWA have the broadest possible jurisdiction over intrastate waters and be consistent with the Supreme Court's holding in the SWANCC case.

The first question posed in the ANPR inquires whether the factors listed in 33 CFR 328(a)(3)(i)-(iii) provide a basis for determining CWA jurisdiction over isolated, intrastate, non-navigable waters. We believe the factors outlined therein provide sufficient basis for asserting CWA jurisdiction over such waters. As noted above, the Supreme Court did not invalidate the regulation, nor did it invalidate the Migratory Bird Rule. Rather, it invalidated the clarification and application of a portion of that Rule. Moreover, Federal Laws such as Migratory Bird Treaties and the Endangered Species Act mandate the protection of intrastate, non-navigable bodies of water that provide habitat for protected birds, species, and plants. We also believe the interstate commerce aspects of the regulation and the Migratory Bird Rule should continue to provide a sufficient basis for establishing CWA jurisdiction over isolated, intrastate waters under the Commerce Clause.

The second question asked in the ANPR is whether “isolated waters” should be defined. The Pennsylvania Department of Environmental Protection (DEP) does not believe that defining “isolated waters” is necessary in order to implement the court’s decision in SWANNC. The only clarification that may be required as a result of SWANNC relates to the interpretation of subpart (b) of the Migratory Bird Rule rather than a broader interpretation or definition of isolated wetlands which may have unintended and far-reaching impacts. The identification of isolated wetlands involves a straightforward observation of the wetland’s connectivity to other surface waters via conveyances or drainage pathways, whether intermittent or perennial, and should be left to field observations. To construct an abstract definition based on measurements of flow or other criteria that requires detailed analysis will only complicate what is easily observable in the field and make compliance for the regulated community more difficult. Further, in its attempt to clarify isolated waters for implementation of the federal wetland program under Section 404, EPA may also be inadvertently and unnecessarily affecting other important Clean Water Act programs not part of the SWANNC decision. Should any definition related to wetlands evolve from this ANPR, it is important that it further the broad objectives of the CWA to restore and maintain the integrity of the nation’s waters and not expand the SWANNC decision into other areas not addressed in SWANNC.

The ANPR clearly assumes the states have the appropriate authority and capability for assuming jurisdiction over isolated wetlands and correctly states that only 15 out of the 50 states have laws or regulations providing protection over isolated waters. Obviously, the level of protection provided by those states varies – some are more protective than others. More importantly, most states have no state laws or regulations applicable to wetlands, isolated, and otherwise. Consequently, important isolated wetlands within those states may no longer be afforded protection under the CWA as a result of the actions being considered under this ANPR. The ANPR also assumes these states will have an incentive to enact laws and regulations designed to address the gap in state authority over isolated waters. Unfortunately this assumption is not based on current political, budgetary or staffing realities. There is little or no incentive for states to enact wetland protection programs. Accordingly, it is important that in order to provide the regulatory coverage for isolated wetlands and implement the provisions of the CWA in those states with inadequate jurisdiction over isolated waters that Federal jurisdiction over such waters be retained to the maximum extent possible.

Pennsylvania is one of those few states that has the necessary state laws and regulations that provide the authority to implement a wetland protection program. Under the Commonwealth’s Clean Streams Law, the Dam Safety and Encroachments Act, and the companion regulations found at Title 25 Pa. Code Chapter 105, the Department of Environmental Protection implements a wetland protection program that is generally similar to and in some aspects more comprehensive than the federal wetland regulatory program. DEP has forged partnerships with the federal agencies to develop a seamless permit application and review process and, since 1996, has been operating under a state programmatic general permit process that has greatly streamlined the permitting process for the majority of permit applicants. Although our state and federal wetlands programs are administratively integrated to provide process efficiency, our respective jurisdictions over wetlands and other water resources, specifically those isolated wetlands addressed by SWANNC, are not interdependent. Therefore DEP does not believe that the SWANNC decision, or the proposed changes to the Federal program announced on January 10, 2003, will immediately or directly affect Pennsylvania’s ability to provide the necessary protection for these important wetlands.

Nevertheless, the proposals contemplated by EPA and the Corps do raise concerns about our ability to offer a consistent and unified federal and state regulatory program to the public. DEP is concerned that the changes being contemplated at the federal level may only complicate the public's understanding of the regulatory programs, create new challenges regarding the implementation of the state's program, and jeopardize effective resource protection. Clearly, a consistent and uniform approach to wetlands protection at the federal and state program levels is beneficial to all.

DEP is also concerned about the suggested proposal to expand the scope of the SWANCC decision to include other provisions of the Clean Water Act including sections 303, 311, 401, and 402. DEP opposes any contraction or reduction in protection of water resources. Although Pennsylvania's Clean Streams Law provides coverage for many activities in Pennsylvania's headwater streams, we have also relied on federal law and regulation in the development of the Commonwealth's programs. For many states, including Pennsylvania, water quality standard programs and NPDES programs are closely tied to federal definitions and authority. Any changes to the definitions of waters at the federal level may compromise state implementation of important state water resource protection programs, which in some cases, have taken years to reach their current level of effectiveness and understanding by the public and the regulated community.

In closing, DEP does not believe that defining isolated waters is necessary and does not support expanding the scope of the SWANCC decision to other programs covered by the Clean Water Act. We appreciate the opportunity to comment on this ANPR. If you have any questions or would like to discuss these comments or review any aspects of our program, please contact Kenneth Reisinger, Chief, Division of Waterways, Wetlands and Erosion Control at 717-783-1384 or by email at kereisinge@state.pa.us.

Sincerely

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